Nos. 80-289 & 80-692

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY
A DIVISION OF AMAX, INC.,
Respondents
and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a union violate Section 8(b) (1) (B) and 8(b) (3) by insisting to impasse and striking to force the employer's participation in a multiemployer trust fund?

2. Is a proposed contract clause that would require the Employer to agree to extend the entire collective bargaining agreement to any of its mines, coal lands, and facilities operated or put into operation by the Employer, subsidiary or affiliate at any time during the duration of the contract, a non-mandatory subject for bargaining and the union's insistence and strike therefor a violation of Section 8(b) (3) of the Act?

3. Is the insistence upon and strike for proposed clauses that would require lessees or licensees to recognize the union violative of Section 8(b) (3) and (e) of the Act?

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STATUTORY PROVISIONS INVOLVED

This case involves the National Labor Relations Act, as amended, 29 U.S.C. § 158 (hereinafter referred to as Section 8 of the Act); the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (hereinafter referred to as Section 302 of the Act or LMRA); and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (hereinafter referred to as Section 501 of the LMRDA). This case also

involves the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002-1108 (hereinafter referred to as ERISA §§ 3, 404, 406 and 408).

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly held that United Mine Workers of America, Local No. 1854, and United Mine Workers of America (hereinafter the Petitioners or Union) had refused to bargain in violation of Section 8(b)(3) of the Act.

The issues raised in the Union's Petition for a Writ of Certiorari represent only three of a number of unfair labor practice violations, including refusals to bargain, found by the Administrative Law Judge (ALJ), the National Labor Relations Board (Board) and/or the Court of Appeals.

Petitioners had engaged in and were found to have committed many acts of refusal-to-bargain conduct in violation of Section 8(b)(3) of the Act. These violations included findings that Petitioners had refused to meet and bargain with Amax Coal Company, a division of Amax, Inc. (hereinafter Amax), insisted that Amax select as its bargaining representative a multiemployer association, insisted that Amax accept non-Amax representatives for negotiations, insisted upon various contract clauses that were nonmandatory subjects of bargaining, and engaged in other conduct (e.g., strikes) in order to force Amax to accede to Petitioners' unlawful demands. The attempts to preclude Amax from negotiating separately and to force Amax to join an association were furthered by various demands including the insistence upon Amax's acceptance of predesignated trustees of a Section 302(c)(5) trust. Amax had proposed retirement and health and welfare programs, which offered the employees better benefits than under the Union Trusts. Petitioners refused to consider these proposals and, instead, insisted that Amax participate in the

multi-employer trust fund. The issues raised in the Petition should be reviewed within this totality of conduct by Petitioners and must be analyzed in that refusal-to-bargain context.

Petitioners' insistence upon and strike to force Amax's participation in a multiemployer trust fund and to select as its representative an already-designated management trustee to the multiemployer trust fund was a violation of Section 8(b)(1)(B) of the Act. Section 302(c)(5) authorizes trust funds for certain benefits, provided that the employees and employers are equally represented in the administration of the funds. When the Petitioners refused to consider Amax's pension and health insurance proposals and insisted to impasse, among other demands, that Amax participate in a multiemployer trust fund, which was tantamount to refusing Amax the right to appoint a trustee, they were restraining and coercing Amax in the selection of its representative for collective bargaining purposes.

Employer representatives and Union representatives on joint trust funds do not lose their representational status by virtue of their appointment as trustees. The duties and functions performed as trustees are, in large measure, that of agents for their respective appointing party. This agency relationship has been long recognized by the National Labor Relations Board.

Further the fiduciary obligations of a trustee do not remove the trustees as representatives or agents of the appointing parties. While trustees owe a fiduciary duty to the trust beneficiaries, this is only one aspect of their status. The management and union trustees, both pursuing the interest of the beneficiaries as a group, have definite and frequently different views on contributions, distributions, and other trust administration matters. On these decisions, the fiduciary obligations are not compromised; rather, they are a plateau upon which bargaining-type decisions are made by the trust representatives. This premise was recognized by Congress when it set forth in Section 302(c)(5)

that if the trustees are unable to resolve a dispute, it is to be submitted to a third party decision-maker (i.e., arbitrator).

ERISA did not change the previously existing duty that all trustees had to act in a prudent manner with respect to the beneficiaries; nor was it intended to remove the trustee from his representative or agency relationship. To the contrary, ERISA § 408(c) (3) recognizes that a trustee may also be an officer, employee or representative of a party in interest. In this context, the Congressional intent of both the LMRA and ERISA has been effectuated.

The Coal Lands and Enabling Clauses insisted upon by Petitioners are not mandatory subjects of bargaining. These clauses apply to non-bargaining unit employees. The clauses fail to meet the "vital concern" test established by the Supreme Court. Matters outside the bargaining unit are to be considered mandatory *only* where they would vitally affect job security and where the extra-unit language constitutes a direct attack on the specific problem. The Enabling and Coal Lands Clauses are general, overly broad, and have a direct and adverse effect upon the enterpreneurial decision-making of the Employer. The clauses, therefore, do not fulfill the requirements for the determination of a mandatory subject of bargaining. Thus, the Union's insistence to impasse and strike were unlawful acts violative of Section 8(b) (3) of the Act.

The Leasing-Licensing Out Clause also is a non-mandatory subject of bargaining. This clause does not protect unit-employee work or standards. Rather, the clause is an attempt to promote Petitioners' interests generally. The clause has a secondary objective, which is to require lessees/licensees to recognize the Union and assume all of Amax's contractual obligations.

ARGUMENT

I.

PETITIONERS' INSISTENCE TO IMPASSE THAT AMAX PARTICIPATE IN A MULTIEMPLOYER TRUST FUND VIOLATES SECTIONS 8(b) (3) AND 8(b) (1) (B) OF THE ACT.

A. The decision of the Court of Appeals for the Third Circuit is not in conflict with existing law.

In their Petitions, the United Mine Workers of America, Local No. 1854 and United Mine Workers of America (hereinafter the Petitioners or Union) and the Solicitor General (hereinafter the Board), argue that the Union did not violate Sections 8(b) (1) (B) and 8(b) (3) of the Act by insisting to impasse and striking to obtain Amax's participation in the UMWA Health and Retirement Funds (hereinafter the Funds), for the reason that trustees of multiemployer pension and welfare trusts created under Section 302(c) (5) of the Act (so-called "Taft-Hartley" fund trustees) are not collective bargaining representatives within the meaning of Section 8(b) (1) (B). This argument is also advanced by Amicus Curiae, Board of Trustees of the UMWA Health and Retirement Funds, in its brief in support of Petitioners.

None of the cases cited as authority by the Petitioners, the Board and Amicus Curiae bear the slightest similarity to the context in which the instant case arose. Petitioners, Board and Amicus Curiae have extracted the most precarious dicta with no regard to context in order to support their argument that the instant case is in conflict with prior case law.

Lamb v. Carey, 498 F.2d 789 (D.C. Cir.), *cert. denied*, 419 U.S. 869 (1974), is relied on by Petitioners, Board and Amicus Curiae for the proposition that Section 302(c) (5) representatives owe their duty "to the [trust] beneficiaries and not to [the appointing party]." (Union's Petition, p.14). In *Lamb*, Carey was designated as a trustee of a UMWA Taft-Hartley fund by Union President Boyle. Subsequently,

Boyle lost the Union presidency to Miller in a hotly contested election and Miller sought to remove Carey as trustee because of Carey's close alliance with the defeated Boyle faction.

The Court of Appeals for the District of Columbia affirmed the District Court's order removing Carey as a trustee of the fund for the sole reason that Carey did not have a good working relationship with the party that had appointed him. The Court stated that a requirement of "crucial importance" was the unchallenged finding of the District Court that "[c]lose collaboration with the Union [on the part of the Union trustee] is required in an atmosphere of mutual confidence to further the objectives and effectiveness of the Fund." *Id.* at 793. The Court found that a Taft-Hartley Fund "is a hybrid trust which does not neatly fit into the categories of ordinary trusts" and, in interpreting the statutory scheme whereby employees and employers are equally represented in the administration of such funds, together with such neutral persons as the representatives select, stated that:

> [i]t is evident that Congress was aware of the unusual need in the field of labor relations for the special interests of the employers and the employees to be *represented* in the administration of the trust. Also, recognizing that such representation might frequently lead to irreconcilable conflict, a neutral party had to be added to the board.

Id. (Emphasis in original).

Clearly, Petitioners' citing of *Lamb* for the proposition that the Section 302(c) (5) representative's duty is to the beneficiaries and not to the appointing party is a distortion of the Court's reasoning, as well as taken out of context.

Petitioners also attach great weight to an alleged contradiction between the Third Circuit's decision in *Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977), and that Court's decisions in *United Marine Division, Local 333 v. Essex*

Transportation Co., 216 F.2d 410 (3d Cir. 1954), and *Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420*, 265 F.2d 607 (3d Cir. 1959). The Petitioners argue that a contradiction exists merely by extracting an out-of-context quotation from *United Marine Division* and comparing it to a quotation from *Associated Contractors*. (Union's Petition, pp. 17-18). This method of "analysis" cannot withstand examination.

In *United Marine Division*, the Court of Appeals expressly stated that the sole question before it was whether Section 302(a) (1) was violated by an employer who agreed to make payments to a Taft-Hartley fund. Section 302(a) (1) makes it unlawful for "any employer to . . . agree to pay . . . any money . . . to any representative of any of his employees." The Court of Appeals held that the trustees of the fund were not "representatives" within the meaning of Section 302(a) (1) but fulfilled the "equal representation" requirement of Section 302(c) (5) (B). The Court based its holding on the ground that the Congressional intent of Section 302(c) (5) was to encourage legitimate trust funds while forbidding money to be paid to union representatives unless through a trust fund. 216 F.2d at 412. Obviously, there is no conflict between this interpretation of "representative", when taken in context, and the interpretation of "representative" given by the Third Circuit in the instant case in the course of finding violations of Sections 8(b) (1) (B) and 8(b) (3).

The fallacy of Petitioners' reasoning is that none of the cases cited apply to a situation where the union is refusing to bargain and trying to force (1) the employer to participate in a multiemployer trust fund even though the employer proposed the same (and better) benefits through an employer plan, (2) the employer to give up its right to select a representative to administer such funds and (3) to accept the preselected trust representatives. Moreover, none of the cases or authorities cited by Petitioners or the

Board even remotely reflect the premises upon which the instant case arises: The totality of conduct clearly established that Petitioners failed and refused to bargain in good faith with Amax.

Briefly summarized, the record below established that Petitioners insisted upon and struck to force Amax to select a multiemployer association as its bargaining representative. Amax refused and sought to negotiate its own collective bargaining agreement, which included better retirement and health and welfare benefits than under the multiemployer trust fund plan. To put further pressure on Amax and to leverage Amax into the association, Petitioners, among other actions and conduct, refused to consider Amax's benefit plans proposals and, instead, insisted that Amax participate in the funds established by Petitioners and the Bituminous Coal Operators Association (BCOA). Such insistence was accompanied by a strike called by the union.[1] It should be noted that the various findings of the refusal-to-bargain violations, such as the strike to compel Amax to join and bargain through a multiemployer association, the coercion of Amax in the selection of representatives for negotiating purposes, the refusal to meet and negotiate with Amax, etc., were not appealed nor contested by Petitioners. It is important, however, that this totality of conduct be considered as it establishes the context in which the issues of these Petitions arise.[2]

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[1] As noted in the Board's Petition on page 4, Amax put into effect its last offer, including its Pension Plan and Health and Welfare Programs.

[2] In its decision, the Board noted that at the time of its decision, there was a petition for an election pending before the Board. See Union's Petition Appendix B, pp. 191a-192a. Subsequently, the election was conducted by the Board and the employees voted to reject the Petitioners herein, as well as a number of other representatives on the ballot.

Viewing all of the circumstances, the Court of Appeals correctly perceived the issue when it concluded that the Union violated the Act by striking to force Amax's participation in a fund whose management trustee is not selected by Amax. See Union's Petition Appendix C, p. 226a.

The Court of Appeals' correct view of the law is shared by at least one other Court of Appeals. In *Denver Metropolitan Association of Plumbing Contractors v. Journeyman Plumbers Local No. 3*, 586 F.2d 1367 (10th Cir. 1978), the Court of Appeals for the Tenth Circuit analyzed the purpose of Section 302(c) (5) and equal-trustee representation, to wit, protection of participants and beneficiaries from exploitation by unscrupulous union officials.

> So long as the employer trustees are truly independent of the domination of the unions, we perceive no reason why each contributing employer must be a direct participant in the trustee selection *if he is willing* to contract away that right.

586 F.2d at 1375 (emphasis added).

The emphasized statement is the key premise in the instant case. Amax was not willing to contract away its right to participate in the trustee selection process.

In contrast, both the Petitioners and the Board mischaracterize this issue by limiting their analysis to the status of a Section 302(c) (5) trustee *during* the administration of an operational plan *after* the parties have executed a contract embodying their agreement to provide such benefits.[3] They fail to include the refusal to bargain aspect of the issue. Instead, Petitioners' frame the issue with axiomatic assertions about the mandatory nature of pension and welfare benefits.

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[3] The Board in its Petition cites the *Denver Metropolitan* case for authority that ERISA requires strict fiduciary standards of trustees. The Board, however, fails to make note of the above-quoted limitation, which is the key aspect of the case that is directly applicable to the instant issue.

This was *not* the issue addressed by the Court of Appeals. Clearly, the decision focuses on the Union's attempted imposition of a multiemployer trust fund with preselected employer trustees during the bargaining prior to reaching an agreement.

It is, therefore, submitted that the basic premise that this Court must consider is whether or not Petitioners can insist upon the requirements (1) that Amax forego negotiations of its own benefit plans proposals and (2) that Amax must agree to participate in the multiemployer (BCOA-Union) trust fund plans. Amax's efforts to preserve its right to negotiate its own benefit plans with the concomitant right to appoint a trustee arose in this context.

In determining that Petitioners could not force Amax's participation in the multiemployer trust funds, the Court of Appeals analyzed the question of whether or not the trustees were representatives within the meaning of Section 8(b) (1) (B) of the Act. The Court of Appeals concluded that union and employer trustee-appointees serve as representatives of the parties who appoint them.

B. LMRA AND ERISA are not inconsistent.

The Court of Appeals correctly held that the provisions of the LMRA and ERISA should be interpreted to effectuate the Congressional intent of both federal statutes so that the trustee representatives of a multiemployer plan serve not only as fiduciaries of the plan within the meaning of ERISA, but also as collective bargaining representatives within the meaning of the Act insofar as their duties as collective bargaining representatives are consistent with their fiduciary duties.

It is axiomatic that provisions in different federal statutes should, if possible, be interpreted to effectuate the Congressional intent of both statutes. *Cutaiar v. Marshall,* 590 F.2d 523, 530 (3d Cir. 1979).

Specifically, the representation duties imposed by Section 302(c) (5) upon the trustees of a multiemployer plan should be construed to coexist with the fiduciary duties imposed by Section 302 and elucidated by ERISA Sections 404(a) (1) (A) (i) and 406(b) (2), so that the trustees serve as both collective bargaining representatives within the context of Section 8(b) (1) (B) and fiduciaries as defined in ERISA Section 3(21) (A). If the duties imposed by Section 302(c) (5) on collective bargaining representatives are construed to conflict with the duties imposed on fiduciaries by ERISA Sections 404(a) (1) (A) (i) and 406(b) (2), contrary to the Congressional intent underlying the equal representation premise of Section 302 (c) (5), the trustees cannot serve in both capacities. Thus, the Congressional intent of both statutes would not be effectuated and a basic legal axiom violated.

1. Representation Role

The role of trustee representatives in multiemployer plans in their capacity as collective bargaining representatives has been widely recognized. There has been candid acknowledgment by the courts that the relationship between employer and employee trustees of a multiemployer plan is quasi-adversarial in nature and that the trustees function not only as fiduciaries for the beneficiaries of the plan, but also serve as representatives of the parties who appoint them.

The Court of Appeals for the Third Circuit has recognized that the requirement that employers and employees be represented in the joint administration of trust funds is central to the Congressional scheme set forth in Section 302. In *Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (1977), the Court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the

> trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. See *Lamb v. Carey*, 162 U.S.App.D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown*, 374 F.Supp. 191 (N.D.Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c) (5). Congress envisioned the conflict of view of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

In the instant case, it is important to note that Article 11(f), Sickness and Accident Benefits, of the Union's January 6, 1975, proposal (attached as Appendix A), established the broad authority of the trust representatives. That authority included the discretion to select and set criteria for "acceptable" insurance carriers; to investigate disputed claims; to establish consistency in the plan coverage and in the awarding of claims; to cull out "unacceptable" insurance carriers; to enforce compliance with what the trust representatives conceive to be the terms and objectives of the plan; and to determine whether provisions of the collective bargaining agreement have been breached and the enforcement thereof.

Such authority to choose, select and eliminate insurance carriers and non-conforming plans is clearly an extension of the collective bargaining process, and the trustees' power to investigate, reject and allow claims can only be equated with the ability to adjust grievances. Moreover, the trustees must determine where the plans, trust agreements or the

bargaining contract itself, have been breached or violated and then pursue all legal remedies (see Article 20, Section (e) of the 1/75 proposal, attached as Appendix A). The trustees further determine the eligibility or ineligibility of pension beneficiaries whose right to receive benefits has been challenged (Article 20, Section (h) (3), attached as Appendix A). Here again, the trustees resolve grievances.

In what is a pure extension of the collective bargaining process, the trustees are authorized, upon approval by the employers and the union, to make such changes in the plans and trusts as they may deem to be necessary or appropriate (Article 20, Section (h) (5), attached as Appendix A). As is the case with any bargaining representative, the trustees confer with their principals and make the desired changes. Article 11 of the pension trust (attached as Appendix A) confirms this wide-ranging delegation to the trustees.

It is obvious, then, that the trustees have broad, discretionary authority. The employer-trustee representative status assigned under Section 302 is for the specific purpose of making sure the trust fund representatives properly make decisions which are "of major importance to the employer, the coal industry, as well as the beneficiaries represented through their Union." *Blankenship v. Mine Workers Fund*, 82 L.R.R.M. 3073, 3074 (D.D.C. 1973).

2. Fiduciary obligations

The trustees interpret, apply, administer and "enforce" the provisions of the fund and the provisions of the collective bargaining agreement in no less important, but probably more significant, a role in the administration of the agreement than Union "stewards" or company "supervisors"; they are even empowered to set and determine contributions to the Trusts.

Concededly, Section 302(c) (5) trust representatives owe a fiduciary duty to the trust beneficiaries. However, that is only one aspect of their status. Both at the bargaining table and at the trust fund conference table, each side has a defi-

nite and frequently different view on how it wants the money distributed. These decisions do not threaten the fiduciary standards. They are a plateau upon which bargaining-type decisions are made by the trust representatives.

Section 501 of LMRDA, entitled "Fiduciary Responsibility of Officers of Labor Organizations", defines in broad terms the obligations of union officials. In particular, Section 501(a) sets forth that "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." It is, therefore, the duty of these officers and representatives "to hold [the union's] money and property *solely* for the benefit of the organization and its members." (Emphasis added).

Thus, a fiduciary relationship is created by Section 501, requiring union agents to act in the interests of the union and its membership. Yet those agents are clearly recognized and awarded status as "representatives" within the meaning of Section 8(b) (1) (B), because they engage in collective bargaining and the adjustment of grievances.

Contrary to the arguments constructed by the Petitioners and the Board, Section 501 demonstrates Congressional support for the proposition that a fiduciary obligation does *not* preclude, and may complement, representative status.

The Congressional intent, evidenced by the statutory scheme of Section 302(c) (5), was to recognize the quasi-adversarial nature of the relationship between employer and employee trustees and to impose a representation duty upon the trustees of multiemployer plans in their role as collective bargaining representatives of the parties who appoint them.

The fiduciary responsibility provisions of ERISA §§ 404 and 406 are designed to restate the common law fiduciary standards of conduct for trustees, administrators and others dealing with retirement plans. Conference Report No. 93-1280, 93d Cong., 1st Sess. 306 *et seq.* (1974) *reprinted in*

Internal Revenue Cumulative Bulletin, 1974-3. Thus, the trustee representatives of a multiemployer plan are not only subject to the representation duties imposed upon them by the LMRA, but are also subject to strict fiduciary duties imposed upon them by ERISA.

Any conflict between the LMRA and ERISA is more apparent than real. *Cutaiar v. Marshall,* 590 F.2d at 530. Whereas Section 302(c) establishes certain structural and procedural requirements for multiemployer plans, ERISA codifies the fiduciary standards for the administration of such plans. Thus, the trustees' representation duties under LMRA Section 302 must conform to the fiduciary standards set by ERISA. As was noted by the Court of Appeals in its decision in the instant case:

> Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process.

614 F.2d at 882.

The situations which present a trustee of a multiemployer plan with problems of reconciling obligations under ERISA with obligations to an employer, union, and others are numerous. Congress chose to solve the problem of divided loyalties by prohibiting a fiduciary from acting in any *transaction* involving a pension plan on behalf of a party whose interests are adverse to the interests of the plan, or its participants or beneficiaries. ERISA § 406(b) (2). However, it must be noted that Section 408(c) (3) of ERISA also provides that nothing in Section 406 shall be construed to prohibit a fiduciary from serving as such in addition to being an officer, employee or *representative* of a party in interest. Thus, even ERISA itself recognizes, and permits, collateral interests.

The case of *Curren v. Freitag*, 432 F.Supp. 668 (S.D. Ill. 1977), is illustrative of the recognition of the representative duties and fiduciary obligations. The issue in that case was whether the activities of a management trustee, who was also employed as the Director of Labor Relations of an employer group signatory to the Section 302(c) (5) Pension Funds, violated his trustee fiduciary obligations. While noting the possible conflict between the fiduciary responsibilities of ERISA and the provisions of Section 302 of the LMRA, the Court stated that Section 408(c) (3) of ERISA provides specifically that a person may serve as a fiduciary with respect to a plan and as a representative of a party in interest. As such, as held by the Court, a trustee is not precluded from fulfilling his representative duties simply because he had become a trustee. The Court posited that the laws must be read together in order to give effect to both. *See also NLRB v. Construction and General Laborers' Union Local 1140*, 577 F.2d 16 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Accordingly, both the LMRA and ERISA should be interpreted so as to effectuate the Congressional intent of both statutes—representation duties *and* fiduciary obligation. The statutes are not mutually exclusive. Rather, the representation duties of trustees of multiemployer plans coexist with the trustees fiduciary obligations insofar as they are consistent.

3. Expansion of NLRB Jurisdiction

For the first time, Petitioners argue that the Court of Appeals decision on the trustee issue expands upon the Board's unfair labor practice jurisdiction to include an area of law that Congress has specifically granted to the Secretary of Labor and federal courts. The creativity of this argument is surpassed only by its lack of support in the logic, law or the realities of industrial life.

For many years, the Board has held that certain Section 302(c) (5) trustees and trust funds have violated Section 8 of the Act by acting as agents of the parties appointing them. *See, e.g., Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (trusts, in refusing to accept contributions, are agents of union and employer); *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (trustees are agents of each party to collective bargaining agreement); *Fixtures Unlimited*, 213 N.L.R.B. 363 (1974) (union trustees are "agents" of respondent); *Turner-Brooks, Inc.*, 161 N.L.R.B. 229 (1966) (union refused to bargain through its agent, Section 302 trustee).

In finding that the trusts and/or trustees have violated the Act through conduct occurring during the internal administration of the trust, the Board has *already* assumed very broad jurisdiction over employee benefit trust administration. Such jurisdiction is totally unaffected by the Court of Appeals' holding in the instant case, which is limited in applicability to bargaining demands made prior to reaching a participation agreement.

4. Subject for Bargaining

The Court of Appeals granted Amax's petition for review and denied enforcement of the Board order pertaining to the trustee issue. One of the bases for this holding is that the Board relied entirely on its decision in *Central Florida Sheet Metal Contractors Association*, 234 N.L.R.B. 1238 (1978), *petition for review pending*, No. 79-2396 (5th Cir.), where it held that a union's insistence in negotiations upon a multiemployer trust fund, for which the employer's, as well as the union's, representatives are already chosen, is not unlawful inasmuch as the limitation on choice of trustees contains more of a "nexus" with employee benefits, which are a mandatory subject of bargaining, than with an employer's right to choose its representatives under Section 8(b) (1) (B) of the Act.

This is a specious distinction. Both parties' "nexus" with benefits is through their representatives, as there cannot be any benefits without a collective bargaining agreement and a representative to "deal" for them.

It is the Board's position that the selection of those charged with the administration of the funds under the trustee designation clause is a mandatory subject of bargaining. At the same time, it has repeatedly held that the selection of representatives dealing with other benefits like wages or hours is a permissive subject. The Board's distinction defies logic and makes a mockery of a principal tenet of our collective bargaining system that each party shall be free to select its own representative without pressure from the other side. Fortunately, the Court of Appeals did not lose sight of this when it held that:

> the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's pension and trust fund violates Section 8(b) (1) (B) and 8(b) (3).

614 F.2d at 882.

Accordingly, those portions of the Petitions attacking this holding should be denied.

II.

THE ENABLING CLAUSE AND COAL LANDS CLAUSE INSISTED UPON BY PETITIONERS VIOLATE SECTION 8 (b) (3) OF THE ACT.

The Court of Appeals found, as did the Administrative Law Judge, that the Enabling Clause and Coal Lands Clause were not mandatory subjects for bargaining and that the Union's insistence upon the scope of the Enabling

Clause and Coal Lands Clause[4] (which goes beyond the bargaining unit) violates Section 8 (b)(3) of the Act.

Both clauses contain language that would require Amax to extend the collective bargaining agreement to "all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, . . ." which may be put into use. The agreement not only applies to the operations of Amax, but would also apply to any operations by any "subsidiary" or "affiliate" of Amax. Further, the agreement would apply to any operations, not just mining. Such language encompasses operations involving employees in bargaining units and prospective bargaining units other than the bargaining unit represented by the Union at Amax's Belle Ayr Mine.

Through a series of decisions, this Court has established the tests to be applied for the determination of mandatory versus non-mandatory subjects for bargaining. In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court initiated the premise that employers and labor organizations are required to bargain on mandatory

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[4] The Enabling Clause provided in part:

> This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this Agreement, or which may hereafter (during the term of this Agreement) be put into production or use on the leases attached hereto as Addendum A.

The Coal Lands Clause provided in part:

> [T]his agreement covers the operation of all coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

PLEASE NOTE: The printed text of the Coal Lands Clause in the Court of Appeals decision contained a typographical error. The word in the first line is "operation" and not "operator".

subjects that are within the areas of "wages, hours and other terms and conditions of employment." Either party has the right to insist to impasse on such bargaining positions.

Subsequent decisions of this Court clarified the determinants of what constitutes a mandatory subject. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), this Court promulgated the test which considers the particular subject matter upon which a party refused to bargain: Is the subject of such vital concern to both labor and management that it is likely to lead to industrial strife? In Justice Stewart's concurring opinion in *Fibreboard*, he observed that the words of the statute, "wages, hours and other terms and conditions of employment", are words of limitation. As Justice Stewart pointed out:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to ... conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment. If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate en-

> terprise or which impinge only indirectly upon employment security should be excluded from that area.

379 U.S. at 223.

In *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court emphasized the application of the "vital concern" test and also gave recognition to the entrepreneurial control factor set forth by Justice Stewart in *Fibreboard*.

> The Board urges that Oliver and Fibreboard provide the principle governing this cause. The Company, on the other hand, would distinguish those decisions on the ground that the unions there sought to protect employees from outside threats, not to represent the interests of third parties. We agree with the Board that the principle of Oliver and Fibreboard is relevant here; in each case the question is not whether the third-party concern is antagonistic or compatible with the interests of bargaining-unit employees, but whether it vitally affects the "terms and conditions" of their employment. But we disagree with the Board's assessment of the significance of a change in retirees' benefits to the "terms and conditions of employment" of active employees.*
>
> ---
>
> *This is not to say that application of Oliver and Fibreboard turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct business, may be equally important. See Fibreboard Corp. v. NLRB, supra, at 217, 13 L.Ed.2d at 242. (Stewart, J. concurring). But we have no occasion in this case to consider what, if any, those considerations may be.

404 U.S. at 179.

Although Petitioners concede that "wages, hours and other terms and conditions of employment" are words of limitation against which the subjects of bargaining are measured (Union's Petition, p. 22), they claim that the very broad and general Enabling and Coal Lands Clauses vitally

affect the terms and conditions of employment of the Belle Ayr miners. Petitioners cite *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959), as demonstrating the same type of third-party vital concern held to be within the mandatory subject area. In *Oliver*, however, the clause reviewed by this Court was a precise and narrowly-drawn provision that set forth a minimal rental to be paid owner-operators wherein the specific object was "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." 358 U.S. at 293-94.

The Enabling and Coal Lands Clauses are *not* precise and narrowly-drawn provisions. They extend far beyond the bargaining unit of miners at the Belle Ayr mine. The clauses cover any and all types of employer-operations, mining and otherwise, and would require that the entire collective bargaining agreement, including mining conditions and other non-economic conditions, be fully applied. In this context, the Court of Appeals' analysis of the clauses is valid, consistent with other Court of Appeals' decisions, and in harmony with this Court's vital concern test.

The Court of Appeals for the Tenth Circuit, in *Lone Star Steel v. NLRB*, _____ F.2d _____, 104 L.R.R.M. 3144 (1980), held that an Enabling and Coal Lands Clause (almost identical to that in the instant case) was a non-mandatory subject of bargaining and that the United Mine Workers Union's insistence upon it constituted a refusal to bargain in violation of the Act. In finding that the Coal Lands Clause (referred to as the "application of contracts" clause) was not a proper bargaining subject, the Court analyzed the various cases and tests in determining what constitutes a mandatory subject for bargaining. The Court of Appeals then went on to set forth:

> The General Counsel and the Union contend here that the application of contract clause protects the jobs and working conditions of unit employees from a danger similar to that in *Oliver*. They argue that the clause removes the Company's economic incentive to

transfer work to another mine where the terms and conditions of employment might be inferior. We cannot agree.

The provision for the minimum rental in *Oliver* was carefully drafted to remedy a specific problem over which the parties had disagreed for seventeen years. 358 U.S. at 291-292. By contrast, the instant clause is not so directed. It is hard to read this language as a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective-bargaining contract." *Id.* at 294. This application of contract clause reaches all new operations and is much broader than necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the Starlight mine. The clause even requires that the agreement be put into effect in toto elsewhere, including the non-economic provisions having no bearing on the unit employees. *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872, 884 (3rd Cir.).

We are mindful that we must accord considerable deference to the Board's judgment as to what is a mandatory subject. *Ford Motor Co. v. N.L.R.B., supra,* 441 U.S. at 495. However we are convinced that here the Board did not properly observe the two-prong requirement of *Oliver* that in order for a subject involving employees outside the unit to be considered mandatory it must vitally affect the terms and conditions of employment or the job security of unit employees and must represent a direct frontal attack on the problem threatening such interests. *See Oliver, supra,* 358 U.S. at 294; *Pittsburgh Plate Glass, supra,* 404 U.S. at 178-79 and n. 18, 182. Here the implementation of the clause could only affect unit jobs if the company opened another mine. The Board ignored the ALJ's finding that application of the contract to other phases of coal production would have no bearing on unit jobs. And as noted the automatic application of the entire collective bargaining agreement, including its non-economic provisions, to other appropriate units employed at other facilities operated by the company

> does not represent the kind of direct frontal attack on the problem demanded by *Oliver*.

104 L.R.R.M. at 3154 (footnote omitted).

In addition to the failure of the Enabling and Coal Lands Clauses to meet the vital concern test, they also fail the entrepreneurial control test. The clauses place a restraint on Amax's freedom to conduct its business and to dispose of its capital assets. In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972), this Court said:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

The Enabling and Coal Lands Clauses involve the same policy considerations underlying *Burns*. The clauses would have a direct and negative impact on Amax's ability to make managerial or entrepreneurial decisions. The clauses would have the effect of saddling Amax with the terms and conditions of employment which could make changes impossible and would discourage and inhibit the transfer of capital.

The Petitioners request that this Court defer to the Board's decision. This Court noted in *Pittsburgh Plate Glass* that:

> 'classification of bargaining subjects as 'terms [and] conditions of employment' is a matter concerning which the Board has special expertise.' Meat Cutters v. Jewel Tea, 381 U.S. 676, 685-686 (1965). The Board's holding in this cause, however, depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce. We think that in holding the 'terms and

> conditions of employment' of active employees to be *vitally* affected by pensioners' benefits, the Board here simply neglected to give the adverb its ordinary meaning.

404 U.S. at 182.

The Court of Appeals was correct in its review and decision. Therefore, this Court should reject the Petition.

III.
THE LEASING-LICENSING OUT CLAUSE INSISTED UPON BY PETITIONERS VIOLATES SECTION 8(b)(3) AND (e) OF THE ACT.

The Administrative Law Judge, Board and Court of Appeals found and held that Petitioners' insistence upon and strike for the Leasing-Licensing Out Clause were a refusal-to-bargain violation. They reasoned that the clause was not a mandatory subject for bargaining, but rather constituted an illegal subject. The clause sets forth:

> The employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this agreement or any section, paragraph or clause thereof.
>
> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

Section 8(e) of the Act proscribes "hot cargo" agreements, i.e., agreements where an object is to cause the employer to cease doing business with any other person. This Court's decision in *National Woodwork Manufactur-*

ers Association v. NLRB, 386 U.S. 612 (1967), sets the standards for the interpretation of Section 8(e). This Court pointed out in *National Woodwork* that (1) Section 8(e) was intended to supplement the existing prohibition against secondary boycotts, 386 U.S. at 633-34; (2) Section 8(e) embodied the same distinctions between lawful primary and unlawful secondary boycott activity, *Id.* at 638-39; and (3) Section 8(e) is violated if the agreement is tactically calculated to satisfy union objectives elsewhere, *Id.* at 644-45.

Applying these principles to the Leasing-Licensing Out Clause, the Board and Court of Appeals found that the clause promoted the union's interests generally and manifested a secondary objective; and, as such, did not preserve unit-employee work.

Petitioners allege that the Court of Appeals and Board misapplied the principles of *National Woodwork* in that inquiry was not made into the immediacy of application, the labor relations, and the circumstances of the employer and industry.

A review of the record below establishes that the Petitioners did not introduce evidence that the clause was intended to protect unit-employee work or standards. In addition, the clear and unambiguous language of the clause ("shall not be permitted unless the work is performed by members of the United Mine Workers . . .") demonstrates the secondary object. Further, when the clause is read in conjunction with the other clauses and the bargaining position of the Petitioner, it is clear that the Board and Court of Appeals correctly applied the principles of *National Woodwork*.

The restrictions on Amax in the clause, coupled with the restrictions in the Enabling and Coal Lands Clauses, would effectively encumber Amax's ability to do business (i.e., lease or license) since the clauses would force the lessee or licensee to comply with the union-recognitional requirements of the collective bargaining agreement. In the coal industry, the leasing, subleasing and licensing of coal lands

is a regular occurrence. The Leasing-Licensing Out Clause would preclude Amax from carrying on this necessary business, which directly affects Amax and the industry. Therefore, it is not designed to preserve unit work, but rather is a union-organizing device. The Board in *Commerce Tankers Corp.*, 196 N.L.R.B. 1100 (1972), *enf'd*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974), under a strikingly similar factual situation, found a violation of Section 8(e) because the union's contract clause was a union signatory clause and did not preserve unit work.

The Court of Appeals and the Board correctly applied the principles of the *National Woodwork* case and the congressional purpose of Section 8(e). Therefore, this Court should reject the Petition.

CONCLUSION

Among other arguments, the Petitioners and Board allege that by allowing the Court of Appeals' decision to stand, multiemployer trust funds will be seriously damaged. In making this argument, the Petitioners and the Board rely on conclusory statements, not the least of which would have this Court believe that the Court of Appeals has held that pension benefit bargaining is no longer a mandatory subject of bargaining. Hence, Petitioners apparently believe that single employer units would be precluded from participating in the multiemployer funds and thereby unable to share in the protection, stability and cost savings offered by such plans. Nothing is presented to support these statements; and, to the contrary, they are not supportable by the record and decisions. Amax had proposed its own benefit plans (i.e., single employer plan). Petitioners refused to consider Amax's proposal. Instead, Petitioners insisted that Amax participate in the multiemployer trust fund plans with the preselected trustees and without the right to appoint its own trustee-representative. In this context, violation of the Act was found by the Court of Appeals.

The Court of Appeals' decision does not change the well-established principle that an employer's contribution for pension and health and welfare benefits are a mandatory subject of bargaining. Nor does the decision preclude single employers from participating in the multiemployer plans as long as such employers are willing to participate and are satisfied with the management representative and/or the opportunity to engage in good-faith bargaining. In those instances, however, where the union attempts to dictate the management representative and refuses to negotiate the matter, then the employer is deprived of its right under Section 302(c)(5) of the LMRA to representation and such action is in violation of Sections 8(b)(1)(B) and 8(b)(3). This is especially true in the instant case where Petitioners attempted to force Amax to join a multiemployer association and designate it as its representative. Petitioners' refusal to negotiate in good faith Amax's proposals and insistence on Amax's participation in the BCOA funds with the attempted imposition of a preselected employer-trustee were in furtherance of this undisputedly illegal object. Petitioners' attempt to divorce this issue from the totality of its unlawful bargaining conduct should not be permitted. The record below clearly demonstrates Petitioners' failure to bargain in good faith, i.e., refusal-to-bargain conduct.

For the reasons set forth above, there is no basis for this Court to grant the Petitions for a Writ of Certiorari. There are no conflicts between the Courts of Appeals in the subject matters. Likewise, there are no conflicts between or within the federal statutes. In essence, the Petitions are grounded upon the Board's and the Petitioners' disagreement with the Court of Appeals' correct interpretation and application of the pertinent statutory provisions and case law. It is submitted that such disagreement is not sufficient to invoke the jurisdiction of this Court.

For the reasons hereinbefore set forth, it is submitted that the findings and reasoning of the Court of Appeals for the Third Circuit are correct. Amax, therefore, respectfully requests that the Petitions for a Writ of Certiorari be denied.

Respectfully submitted,

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DATED: November 25, 1980

APPENDIX A
UNIONS' PROPOSED SICKNESS AND ACCIDENT BENEFITS AND PROPOSED HEALTH AND RETIREMENT BENEFITS

ARTICLE 11—SICKNESS AND ACCIDENT BENEFITS

* * * *

Section (f) Structure and Administration

The establishment, administration, and operation of the Sickness and Accident Benefits plan shall be the joint responsibility of the Employers and the Union.

Not later than March 1, 1975, the Trustees of the United Mine Workers of America Health and Retirement Funds as defined in Article 20 shall prepare and make available to the Employers and the Union a list of at least five (5) and initially not more than fifteen (15) acceptable insurance carriers, based upon scrutiny of model plans provided by the respective carriers and such other criteria as the Trustees may deem pertinent. Subsequent thereto, the Trustees may add additional carriers to the list at their discretion. Upon the approval of the Employers and the Union, but not later than April 1, 1975, this list shall be distributed to all signatory Employers. Not later than May 1, 1975, each Employer shall be solely and individually responsible for provision of the benefits set forth in this Article, either directly or through such of the acceptable insurance carriers as he may designate. If an Employer elects to provide benefits directly, he shall notify the Trustees and shall file with the Trustees an agreement to conform to the purposes and objectives of this Plan.

* * * *

The Trustees shall have the right to investigate fully any or all disputed claims in order to establish consistency of coverage and of the awarding of claims and benefits. Based upon such investigation, the Trustee shall, at the end of the first 12 months experience with this Plan, prepare a report to the Employers and the Union and shall, pursuant to such

report, prepare a revised list of acceptable insurance carriers, based upon the experience of the preceding year. The list may be further revised thereafter at the discretion of the Trustees. The Trustees shall have the power to remove any insurance carrier from the list for failure to provide the benefits described in this Article in a manner consistent with the terms of the Plan, and, in the event that an insurance carrier is so removed, it shall be the responsibility of any affected Employer to cancel any policy or policies he may have with any such disqualified insurance carrier, and to replace such policy or policies with a policy or policies provided by an acceptable insurance carrier, not less than 30 days after notification by the Trustees.

If, on the basis of their investigation of disputed claims, the Trustees find evidence that an Employer who elects to provide benefits directly has done so in a manner inconsistent with the terms of the Plan, the Trustees shall first inform such Employer and shall request that he establish coverage through any of the acceptable insurance carriers that he may designate. If the Employer fails to do so, and if the Trustees find that he is continuing to provide benefits in a manner inconsistent with the terms of the Plan, the Trustees may take such action as they deem necessary, including any and all legal means, to enforce compliance with the terms and objectives of the Plan.

* * * *

ARTICLE 20—HEALTH AND RETIREMENT BENEFITS

* * * *

Section (e) Responsibilities and Duties of Trustees

(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, selected by the other two. The Trustees, or their duly appointed successors, shall serve for the duration of the Agreement and as long thereafter as the proper continuation and administration of the

Trusts shall require. The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D.C.; and Paul R. Dean, Washington, D.C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Trusts.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to one another, to the Trustees provided for under this Article, and to all affected mine workers, to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of the Trusts and Plans.

(3) Action which may be required by the Employers in connection with any matter hereunder, including but not limited to the appointment of a successor Trustee, may be taken by those Employers who are parties to this Agreement, and authorization, approval or ratification of Employers representing fifty-one per cent (51%) or more of the total contributions made to the Trusts during the calendar year (or such shorter period which may have elapsed after the effective date of this Agreement) previous to that in which the action is taken shall be sufficient and shall bind all Employers.

(4) All covenants, rights and obligations accruing to the Trusts, and Benefit Plans, and the Trustees of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trusts Agreements, or Pension Plans, shall be enforced by the Trustees, at their discretion, through any and all available legal means, without first exhausting the grievance and arbitration procedures set

forth in this Agreement, and such Trustees shall determine whether any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements or Pension Plans has been breached, violated or is in default.

* * * *

Section (h)[1] *Administration of Trusts*

(1) Each Employer shall make available to the Trustees within a reasonable time such information as the Trustees may determine to be reasonably required for the purpose of administering the Trusts and Plans.

(2) The Trustees shall respond to all written requests for information, applications and other communications from beneficiaries within 15 working days from their receipt at the office of the Trusts. A response from the Trustees may be either a telephonic communication or a letter acknowledging receipt of such communication from the beneficiary. A pension application must be initially approved or denied within 12 weeks of the receipt of the application. The foregoing shall not apply in the event of delays caused by conditions beyond the control of the Trustees.

(3) Within six months after the effective date of this Agreement, the Trustees shall develop a suitable plan for policing and monitoring the rolls of those entitled to benefits from the Trusts. On at least a quarterly basis, the Trustees shall have available a complete listing of current beneficiaries, identified by UMWA district and local union jurisdiction, if applicable. The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer. In the event that a beneficiary or beneficiaries shall be determined to be ineligible for health care or other benefits, the Trustees shall take prompt action to correct the situation.

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[1] Redesignated "(g)" in UMWA subsequent proposals.

(4) Within six months after the effective date of this Agreement, the Trustees shall conduct a comprehensive review of procedures for monitoring covered medical expenses and shall report to the contracting parties with respect to insuring an effective system of cost controls, especially regarding any fees charged by physicians, hospitals, clinics, pharmacists or others which appear to be excessive. The Trustees shall take such steps as they deem appropriate to improve such procedures, and shall report to the contracting parties on such activities regularly thereafter, at least annually.

(5) The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) To conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

(b) to obtain determination letters from the Internal Revenue Service that the two Pension Trusts will each meet the requirements of Section 401 of the Internal Revenue Code and the Trusts thereunder will be exempt under Section 501(a) of such Code and that the two Benefit Trusts will be exempt under Section 501(c) (9) of such Code;

(c) to establish the deductibility for income tax purposes of any and all contributions made by the signatory operators to the Pension Trusts and Benefit Trusts as paid or incurred; or

(d) to comply with all applicable court or government decisions or rulings.

* * * *